

JAN 21 2009

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 6049

DATE COMPLAINT FILED: August 12, 2008

DATE OF NOTIFICATION: August 19, 2008

LAST RESPONSE RECEIVED:

October 8, 2008

DATE ACTIVATED: October 21, 2008

**EXPIRATION OF SOL: July 1, 2013 (earliest),
August 26, 2013 (latest)**

COMPLAINANT:

Clinton Eugene Curtis

RESPONDENTS:

**Kosmas for Congress and Trudy Duffy, in her
official capacity as treasurer
Democratic Executive Committee of Florida and
Rudy Parker, in his official capacity as treasurer**

**RELEVANT STATUTES
AND REGULATIONS:**

**2 U.S.C. § 431(22)
2 U.S.C. § 431(24)
2 U.S.C. § 441a(a)(2)(A)
2 U.S.C. § 441a(a)(7)(B)(i)
2 U.S.C. § 441a(d)
2 U.S.C. § 441a(f)
2 U.S.C. § 441h
2 U.S.C. § 434(b)
11 C.F.R. § 106.1(a)
11 C.F.R. § 106.1(c)(1)
11 C.F.R. § 109.20(b)
11 C.F.R. § 109.21(d)
11 C.F.R. § 109.23
11 C.F.R. § 109.34
11 C.F.R. § 109.37**

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

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I. INTRODUCTION

The complaint in this matter alleges that Kosmas for Congress and Trudy Duffy, in her official capacity as treasurer, ("Kosmas Committee") and the Democratic Executive Committee of Florida and Rudy Parker, in his official capacity as treasurer, ("Florida Democratic Party" or "FDP") violated the Federal Election Campaign Act of 1971, as amended ("the Act"), in numerous ways. Specifically, it alleges that the Kosmas Committee utilized FDP offices as its campaign headquarters, failed to disclose the related expenditures to the Commission, and that its staff members made phone calls misrepresenting themselves as FDP employees, advocating for Suzanne Kosmas' election. As described in more detail below, it appears that FDP made coordinated party expenditures on behalf of Kosmas for Congress before the primary election, but it is unlikely those expenditures collectively surpassed the \$42,100 maximum a state party may make on behalf of candidate under 2 U.S.C. § 441a(d) or the additional \$5,000 FDP could have contributed to the Kosmas Committee in the primary under 2 U.S.C. § 441a(a)(2)(A). Therefore, we recommend the Commission find no reason to believe that the FDP exceeded the coordinated party expenditure limits in violation of 2 U.S.C. § 441a(d), no reason to believe that the FDP made, or the Kosmas Committee received, excessive in-kind contributions in violation of 2 U.S.C. §§ 441a(a)(2)(A) and 441a(f), no reason to believe the Kosmas Committee failed to properly report to the Commission contributions from the FDP in violation of 2 U.S.C. § 434(b), and no reason to believe the Kosmas Committee knowingly misled voters in violation of 2 U.S.C. § 441h. We further recommend the Commission exercise its prosecutorial discretion and dismiss the allegations that FDP failed to properly report its coordinated party expenditures under 2 U.S.C. § 434(b) and close the file.

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II. FACTUAL SUMMARY

Suzanne Kosmas was a candidate in the August 26, 2008 Democratic primary for Florida's 24th Congressional District. The complaint alleges that the Kosmas Committee used FDP offices as its campaign headquarters and failed to properly disclose to the Commission the use of the office as a contribution from FDP. Complaint at 2. In support of the allegation, the complaint attached an e-mail inviting Kosmas supporters to a "grand opening party" at the address of the FDP office in Titusville, Florida. *Id.* at 2. It also included pictures of an FDP office in Oviedo, Florida with Kosmas signs in the windows, and allegedly Kosmas Committee staff in the office.

Additionally, the complaint contends that Kosmas Committee staff made phone calls on phone lines paid for by the FDP, promoting Kosmas to Democratic primary voters. Allegedly, the caller ID of the phone lines initially stated that the calls were from Kosmas for Congress, but later the ID was changed to reflect that the phone lines belonged to the FDP. *Id.* The complaint states "I was told that the script" that Kosmas Committee volunteers allegedly used when making the calls, states: "Hello, this is 'callers name' calling from the Florida Democratic Party, I am calling to ask you to support Suzanne Kosmas for Congress." *Id.* at 3. Attached to the complaint is an e-mail from a recipient of a call that describes his conversation with the alleged Kosmas Committee staffer and states the call was made from phone number 407-365-7808, that the caller ID for the number was "KOSMAS FOR CONG," and that the call was made at 12:07 pm on July 30, 2008. *Id.*, Attachment 2. The calls were allegedly "repeated all across the district," and the complaint suggests that "hundreds if not thousands" of the calls were made. *Id.*

The joint response from the Kosmas Committee and the FDP maintains that the Kosmas Committee did not use any FDP office space. Response at 1. Respondents explain that it began

10044272574

1 supporting Kosmas in July 2008 after she became the presumptive Democratic nominee in the
2 congressional race, and invited the Kosmas Committee and other state Democratic candidates to
3 send campaign literature to the Party's offices. However, as evidence that the Kosmas
4 Committee did not use the space, FDP notes that it removed the Kosmas Committee materials
5 after the complainant, Kosmas' primary opponent, requested that it do so. *Id.* at 4. The
6 respondents did not address the "grand opening party" e-mail referenced in the complaint.

7 FDP further maintains that it used its own employees and volunteers to make voter
8 identification calls. It also provided a different version of the script used, which read, in relevant
9 part, "Hi, my name is _____, and I'm a volunteer in your neighborhood with the Campaign
10 for Florida. Have you decided who you will be supporting for Congress in the elections in
11 November?" *Id.* at 2. Individuals called who responded they were a "strong" supporter of "SK
12 [Suzanne Kosmas]" were thanked for their support and asked to consider volunteering for the
13 Kosmas Committee. *Id.* If individuals responded they "Lean SK," "UND [completely
14 undecided]," or "Lean TF [Tom Feeney],"¹ the script states they were told "Great, well I hope
15 you will consider supporting Suzanne. We need a strong, independent voice and someone who
16 will truly represent us in Washington." *Id.* The script also lists three questions regarding voting
17 preferences in the races for State House Districts 24 and 32 and the race for Brevard Supervisor
18 of Elections, and included a sentence describing the Democratic candidate's credentials in each
19 race. *Id.* at 3. The script closes by stating "Thank you so much for your time today! Please visit
20 www.KosmasForCongress.com" and "Paid for by the Florida Democratic Party and authorized
21 by Suzanne Kosmas for Congress. This call has been paid for by the Florida Democratic Party."
22 *Id.* Attached to the response are payroll and W-4 forms for three employees that the response

¹ Tom Feeney was the incumbent member of Congress in Florida's 24th Congressional District, and was the Republican nominee for the 2008 general election who ran against Suzanne Kosmas.

1 states are FDP staff members that supervised volunteers making the calls. *Id.* The attachments
2 contain personal and salary information for the employees, but no information about hours
3 worked or tasks performed. *Id.*, Exhibit 1.

4 The response admits that the caller ID on the phone lines at the FDP was initially listed as
5 Kosmas for Congress, but that it was a telephone company error. *Id.* at 3. When alerted to the
6 problem, FDP states that it immediately contacted the telephone company and corrected the
7 caller ID information to show the phone lines belonged to the FDP. *Id.* The response claims that
8 FDP paid for the calls, and attached a telephone bill as proof of the payment. *Id.* at 3, Exhibit 2.
9 The phone bill lists set-up and service charges of \$1,723.43 from July 15 through August 22,
10 2008 for 17 phone lines, eight of which were created on July 14, 2008 and nine of which were
11 created on July 21, 2008. *Id.* Exhibit 2. "FLORIDA DEMOCRATIC PARTY" appears at the
12 top of the bill, with a mailing address of 214 S Bronough Street, Tallahassee, FL 32301. *Id.*
13 The phone number the complaint alleged had the caller ID of "KOSMAS FOR CONG" was
14 listed on the phone bill as one of the phone lines established on July 21, 2008. Finally, the
15 response states that FDP made and disclosed all 2 U.S.C. § 441a(d) expenditures related to the
16 voter identification calls that included references to Kosmas, but did not include the amount of
17 the expenditures. *Id.* at 5.

18 In its August Monthly Report, covering the period of July 2, 2008-July 31, 2008, FDP
19 disclosed that it made no coordinated party expenditures. In its September Monthly Report,
20 covering the period of August 1, 2008-August 31, 2008, FDP disclosed that it made \$5,068.66 in
21 coordinated party expenditures, all before the August 26, 2008 primary election. FDP, however,
22 failed to file the requisite Schedule F disclosing how the funds were spent and which federal
23 candidates it supported with the expenditures. On its 12-Day Pre-General Report, FDP disclosed

10044272576

1 to the Commission that its total coordinated party expenditures for the 2008 general election
2 were \$31,367, but FDP again failed to file the requisite Schedule F, disclosing how the funds
3 were spent and which federal candidates it supported with the expenditures. Neither the FDP's
4 or the Kosmas Committee's reports disclose any FDP contributions to the Kosmas Committee
5 during the 2008 cycle under 2 U.S.C. § 441a(a)(2)(A).

6 **III. LEGAL ANALYSIS**

7 **A. Coordinated Party Expenditures**

8 The complaint identifies two ways that coordinated party expenditures were made on
9 behalf of the Kosmas Committee: (1) the Kosmas Committee's alleged use of FDP phone lines
10 for phone banks advocating Suzanne Kosmas' election, and (2) the Kosmas Committee's alleged
11 use of FDP office space. In the 2008 cycle, FDP was eligible to spend \$42,100 in coordinated
12 expenditures on behalf of a candidate for the House of Representatives in the general election,
13 including expenditures made both before and after a candidate receives the party's nomination.²
14 2 U.S.C. § 441a(d), 11 C.F.R. § 109.34, 73 Fed. Reg. 8696 (Feb. 14, 2008). In addition to
15 coordinated party expenditures, FDP was permitted to make contributions of \$5,000 for both the
16 primary and general elections to candidate committees under 2 U.S.C. § 441a(a)(2)(A). Any
17 expenditure made by FDP "in cooperation, consultation or concert, with, or at the request or
18 suggestion of," Suzanne Kosmas or the Kosmas Committee constitutes a contribution to the
19 Kosmas Committee, and counts towards FDP's coordinated party expenditure limits or its
20 contribution limits. 2 U.S.C. § 441a(a)(7)(B)(i). As discussed below, it appears that the
21 potential coordinated party expenditures alleged in the complaint, if they in fact occurred in

² A state political party may make coordinated party expenditures before or after a candidate has been nominated, and all pre-nomination coordinated party expenditures are subject to the limitations whether or not the candidate receives the party's nomination. 11 C.F.R. § 109.34.

1 whole or in part, do not exceed the \$42,100 coordinated party expenditure limit allotted to the
2 FDP for making expenditures on behalf of Suzanne Kosmas and the contribution limit to the
3 Kosmas Committee.

4 **1. Phone Bank**

5 The complaint alleges that Kosmas Committee staff utilized FDP phone lines for a phone
6 bank in which the Kosmas Committee staff represented themselves as FDP employees and
7 advocated for Suzanne Kosmas' election. Under the Commission's regulations, a political party
8 communication is coordinated with a candidate, a candidate's authorized committee, or agent of
9 the candidate and therefore constitutes an expenditure on behalf of the candidate, when the
10 communication satisfies the three-pronged test set forth in 11 C.F.R. § 109.37: (1) the
11 communication is paid for by a political party committee or its agent; (2) the communication
12 satisfies at least one of the content standards set forth in 11 C.F.R. § 109.37(a)(2); and (3) the
13 communication satisfies at least one of the conduct standards set forth in 11 C.F.R. § 109.21(d).
14 As explained below, it appears that the telephone calls in question meet all three prongs and
15 therefore are coordinated political party communications.

16 The first requirement, or the payment prong, is met when the communication is paid for
17 by a political party committee. Since FDP admitted that it paid for the telephone calls, and
18 provided its telephone bills as proof of payment, the first prong is met. 11 C.F.R. § 109.37(a)(1),
19 Response at 1, Exhibit 2.

20 The second prong, the content standard, is satisfied if, in relevant part, a public
21 communication refers to a clearly identified House candidate and is publicly disseminated in the
22 clearly identified candidate's jurisdiction 90 days or fewer before the candidate's primary
23 election. 11 C.F.R. § 109.37(a)(2)(iii)(A). A "public communication" includes a "phone bank,"

10044272578

1 or more than 500 telephone calls of identical or substantively similar nature within any 30-day
2 period. 2 U.S.C. §§ 431(22) and (24). It appears that the calls in question are a phone bank, and
3 therefore a public communication, because respondents did not dispute the allegation that
4 "hundreds if not thousands" of calls were made across the district, the calls were similar in
5 content because there they were based on a script, and the calls were made within a 30 day time
6 period, from at least from July 30, 2008, as indicated in the complaint, until the complaint was
7 filed on August 12, 2008. The calls satisfy the remaining criteria for the second prong because
8 the calls referred to Suzanne Kosmas, included express advocacy messages of support for
9 Kosmas, and the calls took place within 90 days before the August 26, 2008 primary election in
10 Florida's 24th congressional district. See MUR 5564 (Knowles) (phone calls satisfied the content
11 prong when the calls qualified as public communications because they clearly referenced Senate
12 candidate Tony Knowles and a majority were made within 90 days of the primary election to all
13 Alaska residents).

14 The third prong, or the conduct standard, is fulfilled, in relevant part, if the
15 communication "is created, produced, or distributed at the suggestion of a person paying for the
16 communication and the candidate, authorized committee, or political party committee assents to
17 the suggestion" whether or not there is agreement or formal collaboration. 11 C.F.R.
18 § 109.21(d)(1)(ii). The complaint suggests that Kosmas Committee staff were involved in
19 making the calls. The response states that the phone calls were made by FDP volunteers,
20 supervised by FDP staff, and explicitly states, at the bottom of the script "authorized by Suzanne
21 Kosmas for Congress." Response at 3. Since the Kosmas Committee assented to the calls by
22 authorizing them, the phone communications satisfy the conduct standard. Given that the phone
23 calls fulfill all three of the party coordinated communication prongs, the phone calls are party

10044272579

1 coordinated communications. See MUR 5564 (Knowles) (the Alaska Democratic Party's
2 expenditures for phone calls constituted party coordinated communications when the calls were
3 public communications, referenced the candidate, were made in the requisite time period and the
4 candidate's committee was materially involved in the content of the communications).

5 To determine the costs attributable to the Kosmas Committee, the Commission's
6 regulations specify that "[i]n the case of a phone bank, the attribution shall be determined by the
7 number of questions or statements devoted to each candidate as compared to the total number of
8 questions or statements devoted to all candidates." 11 C.F.R. § 106.1(a). The complaint's
9 description of the alleged "script," based on one recipient's phone conversation, only references
10 Suzanne Kosmas. Complaint, Attachment 2. The script provided in the response contains four
11 questions regarding four different Democratic candidates, including Suzanne Kosmas, and also
12 directs callers to visit the Kosmas Committee web site. Response at 3. Further, FDP represents
13 that it "used [section] 441a(d) funds to pay the salaries and the telephone charges related to these
14 voter identification calls," but it does not provide any information about the total dollar amount
15 of coordinated party expenditure funds used. *Id.* According to the phone bill attached to the
16 response, FDP incurred charges of \$1,723.43 for phone service and set-up during the time period
17 of July 15, 2008-August 22, 2008. *Id.*, Exhibit 2. In addition, FDP provided salary authorization
18 information for three employees: Kristin Tilley, hired July 1, 2008 and paid \$1,750 bi-monthly;
19 Paolo Mastrangelo, hired July 14, 2008 and paid \$1,000 bi-monthly; and Michael Yaros, hired
20 July 21, 2008 and paid \$1,000 bi-monthly. *Id.*, Exhibit 1. The salary authorizations do not
21 include total salary costs for the phone banks, but pro-rated salaries for the three employees for
22 July 15-31 and August 1-26, 2008, the time period between the phone line set-up and the
23 primary, yield a total salary calculation of \$9,894.58, if the employees' entire salary were

10044272580

1 attributed to the phone bank. Thus, based on the available information, the total cost of the entire
2 phone bank, including salaries and phone costs, could be as high as \$11,600 dollars.

3 The available information does not adequately resolve the amount of coordinated party
4 expenditures that FDP should have allocated for the phone banks. However, we do not
5 recommend the Commission use its resources to investigate this matter because even if all of the
6 costs of phone set-up, service and the salaries of the three employees provided were attributed to
7 the Kosmas Committee, the amount would likely not exceed the \$42,100 coordinated party
8 expenditure limit.

9 **2. Use of FDP Office Space as Kosmas Committee Headquarters**

10 The complaint alleges that the Kosmas Committee utilized FDP office space. The
11 Commission's regulations state that expenditures for rent, personnel, overhead, general
12 administrative and other day-to-day costs of political committees need not be attributed to
13 individual candidates, unless these expenditures are made on behalf of a clearly identified
14 candidate and the expenditure can be directly attributed to that candidate. 11 C.F.R.
15 § 106.1(c)(1). If the Kosmas Committee was actually utilizing the FDP office as its campaign
16 office, the cost of using the facilities, including the rent, utilities and possibly office equipment
17 would be expenditures directly attributed to Kosmas, and would be applied to FDP's coordinated
18 party expenditure limit or its contribution limit. See 11 C.F.R. § 109.20(b).

19 The available information, however, does not indicate that the Kosmas Committee did so.
20 Respondents refute the complaint's allegations by stating that it invited the Kosmas Committee
21 and other state Democratic candidates to send campaign literature to the FDP for display and
22 hung Kosmas posters in FDP office windows following that request. Response at 2. It further
23 explains that the signs were taken down when the complainant complained. *Id.* at 4. The

10044272581

1 response also maintains that the alleged Kosmas staffers that the complaint asserts were seen in a
2 FDP office were actually former Kosmas Committee staff employed by FDP at the time. *Id.*
3 Moreover, the respondents maintain that the caller ID on FDP phone lines that stated "Kosmas
4 Committee" was an error by the phone company, and was corrected when FDP discovered the
5 error. *Id.* at 3. The response does not address the e-mail attached to the complaint, sent by a
6 Kosmas Committee staffer that invites Kosmas supporters to a grand opening party, and lists
7 "our address" as 213 South Hopkins Avenue in Titusville. Publicly available information lists
8 213 South Hopkins Avenue in Titusville as an FDP office. The Kosmas Committee's website
9 identifies its campaign office address as 920 3rd Avenue, New Smyrna Beach, Florida.

10 It appears that the FDP had several offices in Florida, including the office in Titusville
11 where the alleged Kosmas "grand opening party" was held, and an office in Oviedo, FL, which
12 was featured in the attachment to the complaint with the pictures of the alleged Kosmas
13 Committee office. While the Kosmas Committee may have used FDP office space for events,
14 the publicly available information on the location of the offices and the factual assertions in the
15 response indicate that the Kosmas Committee did not use FDP office space as its campaign
16 office as alleged. Specifically, FDP's statements that its staff and volunteers, not the Kosmas
17 Committee staff, made the phone bank calls from its own phone lines, and that the caller ID of
18 "Kosmas Committee" on the phone line was a mistake, refutes the complaint's key allegation
19 that may have indicated the Kosmas Committee was using FDP's space as the Kosmas campaign
20 office. FDP's assertions that it unilaterally removed Kosmas campaign posters from its office
21 windows after the complainant requested it do so, and that the alleged Kosmas employees who
22 were purportedly seen in FDP offices were actually FDP employees who no longer worked for
23 the Committee further undercut the premises of the complaint's allegation. Accordingly, FDP's

10044272582

1 expenditures for rent, personnel, overhead, general administrative and other day-to-day costs
2 associated with its offices were not made on behalf of Suzanne Kosmas nor were they directly
3 attributable to Suzanne Kosmas. *See* 11 C.F.R. § 106.1(c). Therefore, FDP's expenditures for
4 such costs need not be attributed to its coordinated party expenditure limit or its contribution
5 limit to the Kosmas Committee. While it is possible that the Kosmas Committee might have
6 owed FDP a rental fee for the use of space for an event if FDP charges others such fees, which
7 may have constituted an additional coordinated expenditure, the cost would likely have been *de*
8 *minimus*.

9 3. Conclusion

10 Based on the foregoing, FDP's activities benefitting the Kosmas Committee were likely
11 in amounts below the \$42,100 coordinated party limit. As such, FDP would not have made a
12 contribution to the Kosmas Committee in excess of the \$5,000 maximum limit per election.
13 Therefore, we recommend the Commission find no reason to believe that FDP violated 2 U.S.C.
14 §§ 441a(d) and 441a(a)(2)(A), and no reason to believe the Kosmas Committee violated
15 2 U.S.C. § 441a(f).

16 B. Disclosure of Coordinated Party Expenditures

17 The complaint suggests that FDP and the Kosmas Committee failed to properly disclose
18 to the Commission expenditures FDP made on behalf of the Kosmas Committee for phone banks
19 and office space. FDP's expenditures benefitting the Kosmas Committee were likely
20 coordinated party expenditures, as discussed *supra*, and in the response, FDP maintains that all
21 of the party's coordinated expenditures were disclosed in its reports to the Commission. While
22 FDP disclosed coordinated party expenditures of \$5,068.66 on its September Monthly Report
23 and \$31,367 on its 12 Day Pre-General Report, it failed to attach the requisite Schedule F to both

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1 reports to disclose how it spent the 441a(d) funds and which federal candidates it supported with
2 the expenditures. Therefore, it appears that FDP violated 2 U.S.C. § 434(b) by failing to
3 properly disclose its coordinated party expenditures. However, the Reports Analysis Division
4 will send a Request for Additional Information ("RFAI") regarding the omission of schedules in
5 the normal course, and the Committee will have the opportunity to amend its reports at that time.
6 Accordingly, we recommend that the Commission use its prosecutorial discretion to dismiss the
7 allegation that FDP failed to properly report its coordinated party expenditures pertaining to the
8 Kosmas Committee.⁷ See *Heckler v. Chaney*, 470 U.S. 821 (1985). With respect to the Kosmas
9 Committee, since neither the Act nor the Commission's regulations require them to disclose the
10 coordinated party expenditures FDP made on its behalf, see Federal Election Commission
11 Campaign Guide, Political Party Committees (Aug. 2004) at 36, we recommend the Commission
12 find no reason to believe that the Kosmas Committee failed to properly report contributions in
13 violation of 2 U.S.C. § 434(b).

14 **C. Alleged Misrepresentation**

15 The complaint alleges that the Kosmas Committee knowingly misled the public through
16 telephone communications in which Kosmas Committee staff represented themselves as FDP
17 staff. Complaint at 1. The Act prohibits any candidate or employee or agent of such a candidate
18 from fraudulently misrepresenting himself, or any committee under his control, as speaking or
19 writing or otherwise acting for or on behalf of any other political party or employee or agent
20 thereof, on a matter that is damaging to such other political party or employee or agent thereof.

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2 U.S.C. § 441h(a)(1). While the complaint claims that Kosmas Committee staff represented themselves as FDP staff, respondents deny any misrepresentation and explain that FDP staff and volunteers, not the Kosmas Committee, made the calls. Response at 5. Moreover, there is no allegation that the calls contained information damaging to the FDP. Accordingly, we recommend the Commission find no reason to believe that the Kosmas Committee misled the public in violation of 2 U.S.C. § 441h.

IV. RECOMMENDATIONS

1. Find no reason to believe that the Democratic Executive Committee of Florida and Rudy Parker, in his official capacity as treasurer, and Kosmas for Congress and Trudy Duffy, in her official capacity as treasurer, violated 2 U.S.C. § 441a(d).
2. Find no reason to believe that Democratic Executive Committee of Florida and Rudy Parker, in his official capacity as treasurer, violated 2 U.S.C. § 441a(a)(2)(A).
3. Find no reason to believe that Kosmas for Congress and Trudy Duffy, in her official capacity as treasurer, violated 2 U.S.C. § 441a(f).
4. Find no reason to believe that Kosmas for Congress and Trudy Duffy, in her official capacity as treasurer, violated 2 U.S.C. § 434(b).
5. Find no reason to believe that the Kosmas for Congress and Trudy Duffy, in her official capacity as treasurer, violated 2 U.S.C. § 441h.
6. Dismiss the allegations in the complaint that the Democratic Executive Committee of Florida and Rudy Parker, in his official capacity as treasurer, violated 2 U.S.C. § 434(b).
7. Approve the attached Factual and Legal Analyses.
8. Approve the appropriate letters.

9. Close the file.

Thomasenia P. Duncan
General Counsel

Date

1/16/09

BY:

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